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Citation for published version:

Michelon, C 2015, 'Reasoning Naturally: A review of John Keown and Robert P George (eds), Reasons, Morality, and Law: The Philosophy of John Finnis', *Jurisprudence*, vol. 6, no. 1, pp. 194-205.
<https://doi.org/10.5235/20403313.6.1.194>

Digital Object Identifier (DOI):

[10.5235/20403313.6.1.194](https://doi.org/10.5235/20403313.6.1.194)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Early version, also known as pre-print

Published In:

Jurisprudence

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Reasoning Naturally

Reasons, Morality, and Law: The Philosophy of John Finnis, John Keown and Robert P George (eds) (Oxford University Press, 2013).

In recent years, Oxford University Press has published a number of festschrifts in honour of philosophers, such as GA Cohen, Myles Burnyeat, Philippa Foot, Anthony Kenny, and Jonathan Barnes. Those volumes are, as a rule, well worth reading as they invariably include chapters which are relevant not only to helping us understand the ideas of the philosophers they honour, but also as self-standing contributions to wider debates. *Reasons, Morality, and Law* is the most recent of those volumes, this time honouring John Finnis's contribution to moral, political and legal philosophy.

The contributions are diverse in style, subject-matter, relevance, and, as might be expected in such a large volume, quality. Each contributor engages with one of Finnis's many arguments and, although there are convergences (some of which are noted below), those are more a result of the attractive pull of the particular idea than a result of the book's design.

As is fitting for a book on the work of a Thomist philosopher, this volume is unusually dialogical. It contains, in the last chapter, a specific reply by John Finnis to each of the 27 preceding contributions. Finnis's responses take a variety of forms: he produces counter-arguments, accepts objections, presents alternative accounts of some of his original intuitions/arguments, and attempts to develop further some ideas presented by contributors. Those replies are relatively brief, but very useful in framing both the common and the disputed territory between Finnis and each contributor and, more importantly, in furthering each particular debate. A further feature that makes the book dialogical is that many of the exchanges between Finnis and the book's contributors occur in the context of ongoing debates. Helpfully, many contributors provide the necessary background for the reader to understand what is being discussed and, sometimes, also a brief account of the previous stages of the argument. In what follows I provide a brief overview of each contribution and, after that foundation is in place, I present a more structured analysis of one of the exchanges, so as to give the reader a flavour of the discussions that can be found in the volume.

Most of the papers collected in Part I focus on Finnis's 'basic goods', but each approaches the theme from a different perspective. Raz (13–23) questions what makes a basic good good. He is not interested in denying that basic goods might be self-evident or in the related question of how to deal with disagreement about those goods. The question he raises is prior: what does Finnis mean when he claims something to be a basic good? Raz focuses on the basic good of knowledge to highlight the question he thinks rests unresolved in Finnis. There are many instances of knowledge, he claims, whose 'goodness' is far from evident (eg to know that

‘some cats were born on 20 November 720 AD’). Joseph Raz believes that Finnis needs to provide some clarity on what precisely would make such knowledge a good. Roger Crisp (24–36) is also not entirely confident that theories which put forward ‘objective lists’ of goods and evils are preferable to hedonism and tries to demonstrate that they are at least equally plausible. He does not doubt that the relevant practical truths are self-evident, but puts forward what he believes to be a more nuanced conception of what self-evidence means, on in which it is easier to relate philosophical argument to what is self-evident (25, 33–35). John Haldane (37–55) also wants to discuss what kinds of arguments would be relevant to settle disagreement about basic goods; he is particularly interested in the role of a philosophical anthropology in such justification and in how it compares to Finnis’s on ‘formalism’. Towards the end of his contribution, Haldane introduces a theme that will recur in many others: Finnis’s conception of public reasons (and its contrast with rival conceptions, such as Rawls’s, Habermas’s and Rorty’s). Joseph Boyle’s contribution (56–72) discusses ethical foundations in a different key. His focus is not on Finnis’s list of basic goods, or on the ways in which they can be said to be good or justified as good. His concern is the relationship between moral principles and the ultimate foundation of those principles, ie the first principles of practical reason. He is concerned with different formulations of what the basic requirement of practical reason is (‘to follow unfettered reason’; ‘to seek good and avoid evil’). His contribution fleshes out the subtle distinctions between different formulations and maps out possible conceptual articulations between the directiveness of practical reason, the notion of unfettered reason and the idea of human fulfilment. Patrick Lee’s chapter (236–48) is not located in the book’s first part, but it too attempts to show how a philosophical anthropology (desired by Haldane) can relate to those principles of practical reason (discussed by Boyle) and to the basic goods (the main concern of Raz’s and Crisp’s contributions). Lee’s defence of (a) ‘substance’ (as opposed to accidents) as the fundamental source of moral worth and (b) rationality (understood in a particular way) as the specific substantial feature where this worth resides, suggest a relationship between human nature, the first principles of practical reason and the basic goods. His argument is, by and large, endorsed by Finnis (526–8).

Jeremy Waldron’s contribution (73–89) moves away from the ideas of basic goods and the foundations of practical reason, focusing instead on the concept of ‘natural law’ and some conditions for its plausibility (75–86): those that lend it a ‘law-like’ character. He identifies and discusses five such features (its deontic character, enforceability, need for ancillary principles, separability from ethics and morality, and shared practice of recognition). What results from this analysis, Waldron believes, is a sense of ‘the positive presence of natural law among us’ (87). Natural law is not identical to positive law, but it must have a ‘positive’ presence in order to qualify as law.

The book's second part revolves around problems of 'Intentions in Action' and the first two papers in that section, by Luke Gormally and Anthony Kenny, take issue with Finnis's rendering of the distinction between intention and side effect. Gormally's paper (93–108) discusses in some detail Finnis's criticism(s) of Anscombe's utilisation of the 'immediacy of effects' as (part of) a criterion to distinguish between intentional action and non-intended side effects. Gormally objects to Finnis's interpretation of this phrase, according to which it appeals to a cause-effect relationship and, consequently, dislocates the focus of intentional analysis from the agent to the third-party observer. Kenny's (109–17) contribution revisits some of the same problems, in particular the 'foreseeability' and 'cause-effect' strategies to delimit intention (as opposed to Finnis's strategy), but here the discussion is limited to the analysis of murder. Part of the argument Kenny uses to attack Finnis's favoured means-end approach is to call attention to the possibility that the agent might herself know less about her intention than a third party observer (115). His greater discomfort underlying this specific argument, however, relates to the fact that the means-end approach seems to be proposing a conception of intention that Anscombe has conclusively proven wrong in her *Intention*. Kevin Flannery's article attempts to show that Finnis's interpretation of Aquinas's theory of action is flawed for a number of reasons, the most important of which are helpfully summarised in his conclusion. The most relevant aspect of that exegetic disagreement is that the conceptions of (a) the object of human action and (b) its bearing on intention presented by Finnis could not be assigned to Aquinas. The collection contains yet another contribution, by Neil Gorsuch (413–24), which is centred on intentionality, albeit this time with a focus on legal civil and criminal liability (a fact reflected in the editor's decision to place this article in the book's fourth part). Gorsuch presents and defends Finnis's objections (both analytic and normative) to recent attempts to exclude (or at least diminish the role of) intention from the conceptual frameworks of legal liability. Cristóbal Orrego's (133–48) main target is the thesis that it is possible to analyse human action without entering the 'disputed field of ethics' (134). In his rejection of that thesis, he and Finnis are in agreement (498), but he also produces an account (and a defence) of Aquinas's typology of action on which he finds new grounds for disagreement with Finnis. According to Orrego, the classification of an action (*qua* human) as good, bad or indifferent is 'primary', and all other specifications of action are subdivisions of these basic categories (146–7).

The longest part of the book (part III) presents a wide variety of contributions under the wide descriptor 'Justice, Rights, and Wrongdoing'. It opens with John Gardner's discussion of Finnis's conception of justice. Although Gardner identifies, towards the end of his chapter (165–66), two points on which he is in deep agreement with Finnis (that justice should be understood primarily in non-institutional terms and that there is a special connection between law and justice), his main concern is to identify and discuss their many disagreements about

justice. He chooses to focus on justice as a virtue of character (as opposed to justice as a state of affairs) in order to highlight those differences. The crucial difference is that, for Gardner, 'justice' is considerably narrower, a result he arrives at by separating the central notion (to justice) of 'what is due' by the person called upon to be just from the related notion of what is 'owed as of right' by the person towards whom the just deed is directed. This distinction, Gardner believes, would result from the facts that (a) justice is not directly connected to rights and (b) should be thought of as addressing primarily the question of how goods and burdens should be allocated. Matthew Kramer (167–85) also discusses an aspect of Finnis's theory of justice, but concentrates on Finnis's desert-focused version of retributivism. He attempts to show that Finnis's particular version of desert-focused retributivism is superior to alternative desert-focused retributivist accounts of punishment, in particular (a) the one that sees retribution as a reaction to the criminal's increased 'freedom' (as proposed by, for instance, Sher) and (b) the 'price' conception of retribution (predicated on Michael Davis's 'crime license' auction scenarios). Punishment would be better justified (from a desert-focused retributivist perspective) if it were conceived as a reaction to the criminal's self-indulgence (in the sense of allowing himself to act in a way that is legally forbidden). Although Kramer does not aim at justifying a retributivist approach, he notes that one condition for this justification is that it should be combined with a suitable liberal-democratic theory of criminalisation (183) (a point disputed by Finnis in his reply, at 506). Finnis's conception of retributive justice (and its apparent opaqueness to mercy) affords Jacqueline Tasioulas and John Tasioulas (219–35) an opportunity to discuss the paradox of mercy (how is it possible to be both merciful and just), with particular reference to an interesting interpretation of one of Shakespeare's 'problem plays', *Measure for Measure*.

Leslie Green's contribution (186–203) is also concerned with a liberal political justifications to state power. His central problem is to identify suitable principles to justify limits to state action in general. The kinds of limits Green is concerned with are the 'upstream' limits he sees as typical of liberal theories, namely: (a) a 'sphere of protection' from state action and (b) a restriction on the means of state action (normally to legal action according to the rule of law). Green believes that the 'instrumentality principle' he attributes to Finnis is not an adequate justification for limiting state power, and the chapter is an attempt to show precisely why. Christopher Tollefsen's chapter (204–18) also deals with aspects of Finnis's political philosophy, attempting to provide a defence of a crucial aspect of his political perfectionism: the argument 'against enforcing morality as such' (a concern also present in Green's chapter). Tollefsen's interest, however, is not so much in mapping out general principles for state limitation (although the state's 'instrumentality' also features in his argument) as it is to defend Finnis's thesis that state intervention should be limited to actions that are both *interpersonal* and *external*.

Gerard Bradley's contribution to the volume (249–68) is not his first piece criticising *Roe v Wade* and, more specifically, one of the three main propositions of law on which that decision rests: that the unborn are not 'persons' for the purposes of the Fourteenth Amendment to the American Constitution. What is new in this attack is his attempt to show a relevant conflict between (a) the way in which the unborn are treated in *Roe v Wade* and (b) the way many American jurisdictions treat the unborn with respect to violence perpetrated against them by people other than their mothers. In spite of its doctrinal focus, Bradley's article can be grouped together with the two articles that immediately follow in the book, written respectively by Anthony Fischer OP (269–89) and John Keown (290–307), as all three deal with questions central to bioethics. Both Fischer and Keown present accounts of Finnis's contribution to the field and, in doing so, remain in fundamental agreement with that contribution, often expressing their exasperation with the current state of bioethics. Fischer's contribution starts with an attempt to characterise the basic goods relevant to the field (life and health), and then moves on to discuss the principles and norms that structure Finnis's approach to bioethics. Keown's chapter organises its exposition and discussion of Finnis's bioethical approach in questions pertaining to the beginning of life and questions pertaining to the end of life, revisiting classical bioethical themes, in particular abortion and euthanasia.

The first four essays in the book's fourth part, which contains contributions with a clearer legal philosophical focus, deal with the tension between law's social dimension and law's normative dimension, and with the related question of whether (and how) Finnis's 'central case' methodology is able properly to account for both. NE Simmonds opens this section with a reflection on the place of social practices in general theories of law (311–26). He is specifically concerned with explaining the shortcomings of a theory of law that saw itself as simply descriptive of social practices and with providing an alternative notion of how to do legal theory which, preserving a role for social practices, would also allow an explanatory role for 'the point' of those practices. Timothy Endicott (327–45) discusses Finnis's 'central case' methodology and points out that defining the central case purely by reference to its *good* intrinsic purpose is somehow arbitrary. The central case might also contain ills and, in fact, Endicott goes on to argue that law's central case cannot be defined simply by reference to its good. It is 'necessarily good and necessarily bad: law in its nature is evaluatively complex' (335). Timothy Macklem (346–60) is considerably less sympathetic than Endicott towards Finnis's 'central case' methodology. His article also revisits the problem discussed by Simmonds regarding the possibility (and desirability) of conceiving law 'purely' as a social practice only contingently related to normative considerations. Julie Dickson attempts to approach the tension between the social and the normative in a different manner. She identifies four senses of explanatory priority (priority as a starting point in a theory; priority as explanatory dependence; priority as importance in the process of identifying law; priority

of importance in law's nature) and utilises those categories to present and, to some extent, evaluate Finnis's own conception of the relationship between the social and the normative dimensions of law.

Maris Köpcke Tinturé's article (379–95) focuses on law's normative dimension and starts by providing a very clear presentation of Finnis's thesis that legal obligation should be understood as isolated from general moral argument. That exposition builds up to the final part of the argument, where she argues against Finnis's refusal to accept that law (necessarily) claims to be morally obligatory (392–5).

In his contribution, Richard Ekins (396–412) considers aspects of Finnis's conception of constitutional principles, in particular the principle of continuity of the legal system and its central implication, that is, the continuity and identity of the society to which that system of laws relates. Throughout the essay this idea of continuity is related to central questions of what it means to belong to a particular political community, in particular the question of what is owed to and by citizens and aliens. Ekins tries to demonstrate the content of and connection between those principles by comparison (and often contrast) with a number of recent judicial decisions, such as *Belmarsh*¹ and, more recently, *AXA*.²

The book's final part contains two essays on aspects of Catholic teaching. Thomas Pink's contribution (413–42) focuses on the question of how the Catholic Church conceives and justifies religious liberty, with a particular focus on whether Vatican II's declaration *Dignitatis Humanae* is compatible with ascertaining the Church's authority to coerce belief and practice. The last chapter, written by Germain Grisez (443–56), undertakes an investigation of the moral ought and, in doing so, proceeds in layers: (a) Grisez first considers the moral ought's force without reference to the creator; (b) secondly, he considers what the postulation of a creator (which might prescind from reference to revelation) adds to that normative force; and (c) thirdly, and now in dialogue with revelation, Grisez asks how the impact of the postulation of the kingdom of God might affect the moral ought.

The real force of the contributors' arguments can only be glimpsed from the brief descriptions set out above. Given the number and diversity of contributions, it is difficult to give, in a short review, a real sense of each exchange in the book. Let me then present one of those exchanges in more detail: the dialogue between Leslie Green (186–203) and John Finnis (510–18) on the limits of state action. I hope that the preceding short descriptions suffice to demonstrate the interest and currency of many debates contained in the book, and that my singling out this particular exchange for comment is not an indictment of the other contributions, many of which I would have been equally happy to concentrate on.

¹ *A v Secretary of State for the Home Department* [2004] UKHL 56.

² *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46.

As we saw above, Green is concerned with Finnis's conception of the normative limits to state action or, to be more precise, with one way in which Finnis (on Green's interpretation) tries to establish those limits: an argument based on the 'instrumentality principle' (*IP*). Green thinks this principle is the wrong way to go about justifying limits to state action and, towards the end of the chapter, he presents elements of what he thinks might be a more fruitful line of argument to provide such justification. Let me unpack this. Green questions whether an argument based on the *IP* is able to justify certain kinds of 'upstream' constraints on state action, which he sees as typical of the liberal tradition of limited government. Those constraints are of two kinds: (a) the constitution of a 'protected sphere', within which 'certain decisions and activities are to be reserved for individuals and groups, especially those that involve matters important to their moral independence and autonomy' (192); and (b) a restriction of means, as only certain means of action are available to the state (typically the law and the rule of law (192)). As Green points out, the *IP* is not the only putative principle on the basis of which an argument could be built to justify such upstream constraints on state action. Other principles such as effectiveness (government should 'not try to do what it cannot accomplish' (195)), efficiency (government should 'not do what others can do better' (195)) and subsidiarity ('higher level organizations should not do what lower-level organizations can do adequately' (195)) might also be able to justify them. In fact, Green's own suggestion (stemming from what he terms 'fallibilism') relies to some extent on the efficiency principle (I will return to that suggestion later).

Green sees Finnis's *IP* as more ambitious than any of those principles, as it would justify a wider ban on state interference in certain kinds of association found in civil society (families, friendships, organised religion). Green takes the formulation of the principle from Finnis's 1996 essay on limited government. On that formulation, state regulation of associations possessing a non-instrumental common good

should never ... be intended to take over the formation, direction, or management, of these personal initiatives and personal associations.

The argument to justify the principle that Green attributes to Finnis (call it argument *A*), put succinctly, would be that: (i) the state is (solely) instrumentally good; (ii) actions by associations that are solely instrumentally good cannot 'take over the formation, direction, or management' of associations which instantiate intrinsic goods; (iii) families, friendships, and churches (and potentially other associations) instantiate intrinsic goods. From (i), (ii) and (iii), a limit to state action would follow: the actions by the state cannot 'take over' the formation, direction or management of families, friendships and churches (as well as other associations that might instantiate intrinsic goods).

Green objects to all three of argument *A*'s premises. Against premise (i) he argues that the state (and the political community it embodies) should not be conceived as being solely instrumentally good (even though he is careful to distance himself from philosophies that see the intrinsic good which is 'instantiated' by the state as paramount, or even as a necessary condition, for human fulfilment (196)). Finnis, in his reply, accepts that his work on the subject up to and including his *Aquinas*³ 'omits the intrinsic desirability of a communal flourishing' (510–11), which is not reducible to the sum of the individual flourishing of each member. This communal flourishing is embodied in the state and the political community, and hence the state cannot ultimately be seen as possessing solely instrumental value (513–14). By accepting that point, Finnis agrees that argument *A* is, in effect, unsound. In his reply to Green, Finnis shows that from *Aquinas* onward he has accepted that the state does not have solely instrumental value (514). Certain aspects of the *public good* (the good of the state or political community) are intrinsically valuable: human flourishing comprehends *inter alia* a specific form of flourishing which is distinctively political. In *Aquinas* that aspect of human flourishing seems to be connected to corrective and retributive justice,⁴ but, for our purposes here, there is no need to dwell on what that 'political flourishing' would be. From the above it is plain that, whether or not argument *A* is present in Finnis's post-1998 work, that argument would now be considered unsound by both Green and Finnis. So, if Finnis wants to subscribe to the *IP* (ie that the state 'should never, or only exceptionally ... be intended to take over the formation, direction, or management, of these personal initiatives and personal associations'), a different argument is needed—one that does not rely on a systematic priority of intrinsic value over instrumental value. Incidentally, Green also objects to this priority of intrinsic over instrumental value, which he takes to be at the root of argument *A*'s premise (ii), but given that premise (i) was rejected by both, there is no need to investigate his objections further at this stage. We will return to them later in an attempt to evaluate other possible arguments for the *IP* hinted at by Finnis.

In his reply, Finnis states that he does indeed subscribe to the *IP*. His reply to Green does not contain a complete argument in defence of the principle, but in *Aquinas* he has offered a more complete account of what one such defence would look like. But before discussing this argument, we should first clarify the precise scope of the principle Finnis wants to defend (something that Finnis himself does at 514–15). The principle is meant to be compatible with significant levels of state intervention and regulation in the lives of individuals, families and friends. The kinds of state interference prohibited by the principle are only those in which the state 'takes over' individual life, families and friendships. Finnis rejects Green's interpretation of what he meant by 'take over' as implying a ban on 'interference with what

³ *Aquinas* (Oxford University Press, 1998).

⁴ *Ibid.*, 245.

we might call the internal aspects of an associational group (its membership criteria, its authority over its members)' (194, 514–15) and also that the principle would 'direct the state to allow these organizations to do their own thing' (194, 515). Finnis admits that 'taking over' is a rather vague expression, but claims that it is not devoid of content (515).

An argument in favour of that narrow conception of the *IP* is hinted at by Finnis in his reply, and presented in a more developed form in chapter VII of *Aquinas* (call it argument *B*). It is predicated on two claims about human flourishing: (i) human flourishing should be conceived of as complex, ie as made up of a number of goods irreducible to each other (a thesis Finnis has been defending at least since *Natural Law and Natural Rights*); and (ii) at least some of those goods are *only realisable within* particular forms of human association (say, the family). From those premises Finnis argues that the state should not act in such a way as to significantly hamper ('take over') those associations which are necessary conditions for the realisation of the goods which are an integral part of a flourishing human life (say, by regulating families in a way that reduces them to organs of the state). The argument was here presented in elliptical form, as (a) and (b) would need to be supplemented by other premises to be able to support the *IP* (eg that it is not impossible to realise those different aspects of human flourishing simultaneously). It seems to me that argument *B* (including its narrow conclusion) would avoid the objections raised by Green against argument *A*. There are indeed many substantive differences between the arguments. Argument *B* does not depend on ascertaining the superiority of 'private' (intrinsic) over 'public' (instrumental) goods, as it could succeed even if they are equally important for human flourishing. So the introduction of a distinction between instrumental and intrinsic value (something on which argument *A* depends) would be unnecessary for argument *B* to work.

It is worth noting that, even in the more elaborate version of the justification for state intervention put forward by Finnis in *Aquinas*, with its many caveats and qualifications, it is not easy to disentangle elements of the two arguments. Although Finnis does indeed qualify the state's instrumentality (it is only instrumental 'in a sense', as in *Aquinas* p 239), the fact remains that one of the main distinctions in chapter VII of *Aquinas* is between *direct* instantiations of goods in some non-political associations (paradigmatically families) and the instrumental nature of the relation between the state and those associations. Perhaps Finnis also has in mind a third type of argument.

Arguments of type *C* would rely on a relation of instrumentality between state and other associations, where the latter's success is facilitated by the former. Finnis is quite clear about the existence (and the importance) of that instrumentality relationship, although its connection to arguments about state limitation is not entirely clear. Allow me to speculate. Argument *C* might have a much less ambitious aim in sight (as compared to argument *A*); its conclusion could simply be something like the following: the state, *qua facilitator* of the success of

‘instantiating’ associations, should not take over the association and subject it to its (typically political) purposes. An argument to justify such conclusion would be close to argument *A* in the sense that it would make use of the idea of an instrumental relationship between state and ‘instantiating’ associations. But it differs from argument *A* in that (a) it does not suppose the state to have solely instrumental value and (b) the instrumentality relationship it supposes is not identical to the one which is assumed in argument *A*; in argument *C* the instrumentality relation is taken piecemeal, rather than wholesale. While in argument *A* the state’s instrumental value is considered *per se* (ie not with reference to any particular instrumental relationship), in argument *C* the state’s instrumentality only features in its specific relationship to particular ends of particular intrinsically valuable associations.

Difference (a) makes argument *C* resistant to Green’s objection that the state does not have solely intrinsic value. But does difference (b) make argument *C* also resistant to Green’s 3 remaining objections to argument *A*? Let’s take them in turn.

Green argues that differences in the kind of value (instrumental/intrinsic) do not imply difference in *value*. As he puts it, ‘[i]ntrinsic values can be trivial and “weak”, while instrumental values might be strong and highly desirable’ (195). Now, the basic premise of argument *C* does not imply that that is not the case. In that premise, the state is only considered *qua* instrumental to the specific intrinsically valuable association. Nothing is said about the state being a very good instrument in itself (ie an instrument to multiple other intrinsically valuable pursuits). What the premise tries to establish is not a relationship between two kinds of value, but rather a relationship between something that is intrinsically valuable (say, the family) and something considered only in its instrumental relationship *to that intrinsically valuable association* (say, the state *qua* facilitator of the flourishing of family life). On that limited reading, the premise resists Green’s first argument.

Green’s second objection to argument *A* is that state direction of social groups need not spoil their intrinsically valuable common goods. This argument, as we have seen above, might not be incompatible with both arguments *A* and *C* if one accepts that the prohibition on ‘taking over’ leaves a lot of room for state direction. I am not entirely clear as to whether the precise level of state direction justifiable by *C* is enough to contemplate Green’s worry, but it seems to me that there is no reason to believe that *C* is necessarily incompatible with the required level of state direction.

Green’s third objection (195–6) is that the connection between the intrinsic value of an association and the association’s success in pursuing these intrinsic values (while avoiding generating disvalue in relation to other goods not intrinsic to it) is not straightforward: those associations might produce both value and disvalue and state intervention might be able to help associations to be successful in the pursuit of their intrinsic values. Finnis’s explanation about the compatibility between state intervention and the need to prevent the state from

‘taking over’ the association would suffice to conclude that argument *C* resists this objection, at least at this level of generality. There is, of course, much room for disagreement at the more concrete level of discussing which kinds of intervention will be tantamount to a ‘take over’, but at least on one reading of *C* (which might or might not be endorsed by Finnis), intervention would have to be quite exceptional in order to be excluded.

However, it must be noted that argument *C*, as an attempt to limit state action, might be more easily faulted for lack of ambition than for unsoundness. The possible justifications for state action in relation to a particular association are not restricted to the service it renders to the full flourishing of that association. State action in relation to any association could be justified on the state’s intrinsic value, on the service it renders to other non-instrumental values instantiated by different associations (families, churches, friendships), and on aspects of the good of individuals which are not directly connected to a particular form of human association (eg the good of physical integrity). As argument *C* only limits state action in the very specific service relation between state and a particular association, the argument is unable to justify anything like Green’s liberal upstream limitations to state power (ie, neither the private ‘protected sphere’ nor the general ‘restriction of means’).

After critiquing Finnis’s use of the *IP* as able to justify limits to state action, Green sketches what he believes would be a more fruitful line of argument to limit state action. The final part of the exchange between Finnis and Green focuses on whether this suggestion is a viable strategy.

Green’s argument starts with a fairly straightforward account of the limitations on our access to moral truths. He says that ‘[e]ven if we have consensus on moral propositions we must acknowledge that, if it is possible *to be* wrong about them, it is also possible *that we are* wrong about them’. Taking fallibilism seriously in the political arena means that our political institutions should ‘plan actively for it’. That planning would necessarily involve devising three kinds of institutional structures: *error-detection* mechanisms (eg rights of free speech), *error-reduction* mechanisms (eg the principle that the state should not interfere in areas in which it is more likely to get it wrong than a sub-state entity), and *error-correction* mechanisms (eg periodical elections).

Finnis does not disagree that fallibilism has important political implications. In fact, he agrees with Green that this is a good ground on which to justify the protection of free speech, and also adds other possible institutional structures which might be justified on the basis of fallibilism (eg separation of powers). But he strongly disagrees with Green on two aspects of his fallibilist-based defence of state limitations. First, Finnis disagrees with Green’s claim (following Mill) that ‘we have reason to believe that in certain areas governments are especially likely to fall into error’, in particular in matters of ‘purely personal conduct’ (202). On this formulation, Green’s claim ‘postpones’ the underlying normative problem, which

resurfaces when one tries to understand what is meant by the phrase 'purely personal'. Green is clear that within the concept's extension matters of belief, sex and friendship are to be included. The concept's intension is slightly less clear and that is where Finnis wants to focus. For Green, 'there are chasms of incomprehension that make it difficult to know what it is like to be in another person's position, and thus difficult to have any accurate appreciation of the effects that one's proposed policy may have on him'. Matters that are 'purely personal' seem to be those in which others would have difficulty understanding the stakes of the decisions to be taken. As a consequence, others would be unlikely to be as well informed about at least some considerations bearing on the decision as the people who will be affected most directly by the decision. Finnis argues that this is simply not the case, as there are myriad ways to achieve the relevant insights without experiencing the actual threat of a decision bearing on the agent (516). My own worry about this particular strategy is that whatever *epistemic* criterion we use to identify what is a 'purely personal' matter, it will have to explain not only that a particular group of activities/experiences cannot be appropriately understood by others, but also that other activities/experiences *can* be understood. Someone else's sexual desire, or religious elations, would have to be said to be more opaque to others than their excessive greed or the repulsion they feel for people who are not 'similar enough' to them. I am sceptical about the fact that an epistemic argument could succeed in that task and my own scepticism relates to Finnis's second objection to this particular consequence that Green tries to draw from fallibilism.

Finnis believes that the only way to settle whether (and which aspects of) public morality should be allowed to inform legal and political decisions is through substantive moral argument, rather than an epistemic argument (517). For him, the questions about whether churches and religious practices, or certain forms of sexual conduct, or certain forms of greedy behaviour, should be forbidden, fostered or merely tolerated cannot be settled on the ground that the state has less perfect epistemic access to certain facts bearing on decisions than individuals or non-political associations would have. That is not to say that epistemic considerations cannot be morally relevant (as we saw above, Finnis gives examples of how fallibilism might have an impact in institutional design). But Green's attempt to identify a private sphere protected from state interference on the basis of the opacity of the private sphere (the sphere where one finds religious belief, sex and friendship) to others (or at least to the state) would need a much stronger argumentative backing than the one provided by Green in his contribution to the book. In fairness, Green's argument from fallibilism for state limitation is only ever sketched, and reads more like a research agenda than a complete argument.

I am sceptical about the possibility of building an epistemic argument along the lines suggested by Green. But an argument that sees that opacity of the private sphere to the public

sphere might be successfully built as a *political* argument. Perhaps the *form* of political arguments ('public' arguments, in Finnis's language) might not be able to convey into the public domain certain kinds of private experiences (because they simply don't translate into a public register). An argument grounded on that form of opacity might be able to justify certain aspects of private life remaining protected from state decisions which, by definition, can only be appropriately taken on political grounds. But this review is certainly not the place to explore the possibilities opened by that justificatory strategy.

My rendition (and partial reconstruction) of the exchange between Green and Finnis in their respective contributions to *Reasons, Morality, and Law* aims at providing a clearer sense of the dynamic engagements the reader will find between Finnis and many of the contributors. Such exchanges are not ubiquitous in the book, but are frequent enough to make it a valuable asset to anyone with an interest (including a critical interest) in the work of John Finnis and, more generally, in the new natural law approach to law and to ethics.

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